

# Water Rights and Water Justice for Kansas Tribes

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Joint Committee on State-Tribal Affairs  
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# Outline of Presentation

1. Western Water Law and its Main Problems.
2. Tribal Sovereignty and Tribal Water Rights.
3. The Process of Reconciling Tribal Water Rights with State Law Rights: Adjudications and Settlements.
4. Examples across the West: Montana, Kansas, Arizona.
5. Questions.

# Western Water Law, Simplified

- Originally and mostly established under **state** law.
- A water right is the right to put water to **beneficial use**. Not ownership of the water itself. As a use right, it can be lost for non-use— the “use it or lose it” issue.
- Western water rights are **severable**— they can be moved around. Denver, Albuquerque, Los Angeles.
- Two principal duties of most western state water officials:
  - (1) put water to beneficial use, by granting water rights;
  - (2) in times of shortage, administer (shut off) rights according to their relative *priorities*— when the right was first established, when the water was first “appropriated.” “**First in time, first in right.**”

# Two Founding Problems.

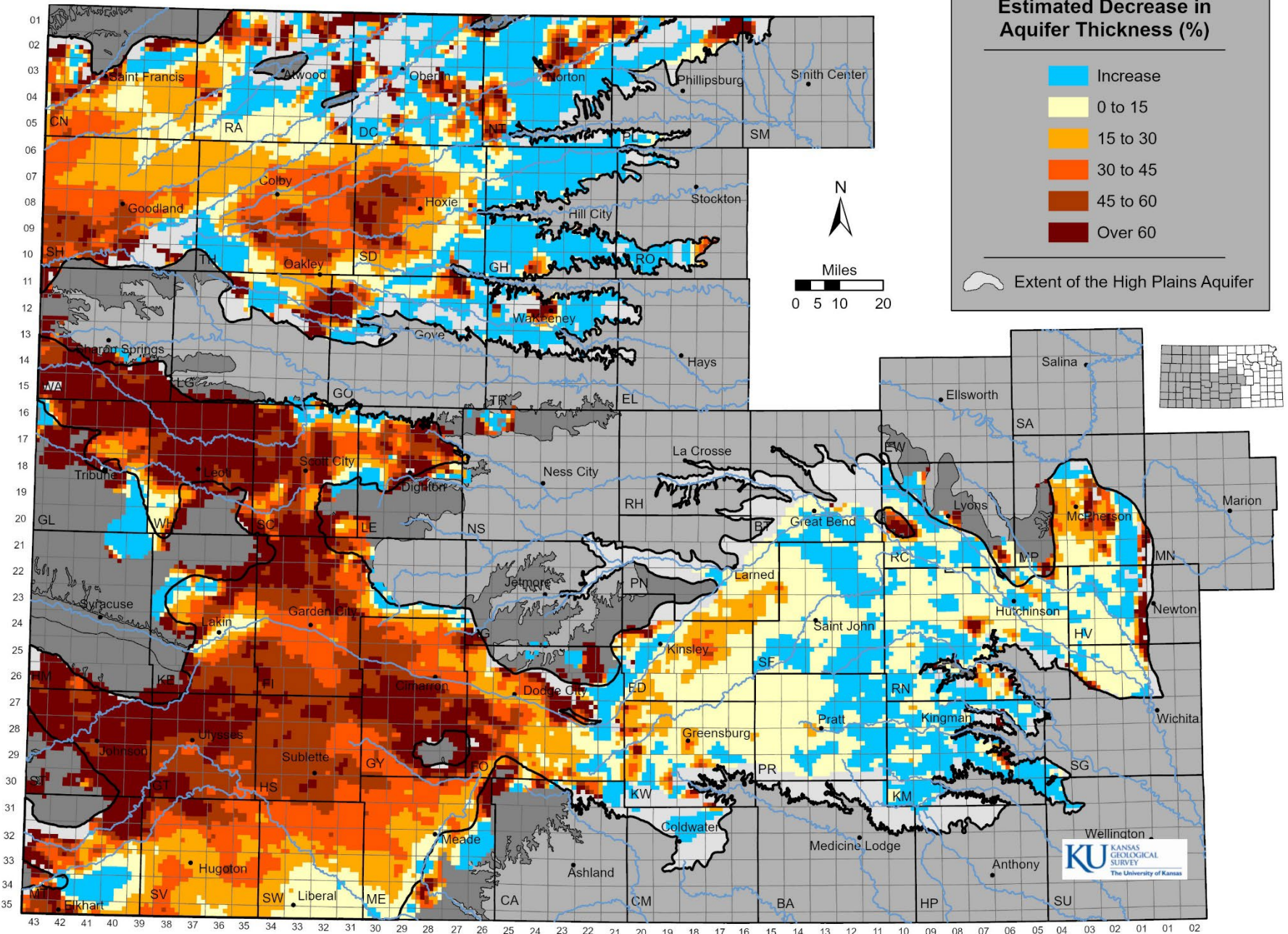
1. Private owners routinely claim more water rights than the system can provide. Because greed and ignorance and lack of technology.
2. The state's duty to put water to beneficial use generally conflicts with its duty to protect senior rights in times of shortage. Because politics.

The result: “over-appropriation.” Elwood Mead, *Irrigation Institutions* (1903).

# Kansas Water Law

- The Kansas Water Appropriation Act of 1945 (“KWAA”); amended 1957. K.S.A 82a-701 *et seq.*
- Adopts the prior appropriation doctrine statewide, for both surface and groundwater.
- Puts the administration of all water rights in Kansas under the jurisdiction of the chief engineer of the Division of Water Resources, KDA.
- Has allowed and even encouraged the over-appropriation of water supplies and the under-protection of senior water rights.

# Percent Change in Aquifer Thickness, Predevelopment to Average 2020-2022, Kansas High Plains Aquifer



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Saint Francis, Arkwood, Oberlin, Horton, Phillipsburg, Smith Center, CN, RA, DC, IN, SM

Colby, Goodland, Hoxie, Hill City, Stockton, SH, TH, SD, GH, RO, Waukegan, Hays

Ellsworth, Salina, SA, Lyons, McPherson, Marion, Tribune, Leoti, Scott City, Dighton, Ness City, La Crosse, Great Bend, Larned, RC, MP, MN, Newton

Wichita, Hutchinson, Saint John, Kingman, HV, Garden City, Jetmore, PN, Kinsley, Larned, ED, RN, SG, Johnson, Ulysses, Sublette, GY, FO, Pratt, Greensburg, Medicine Lodge, Wellington, Anthony

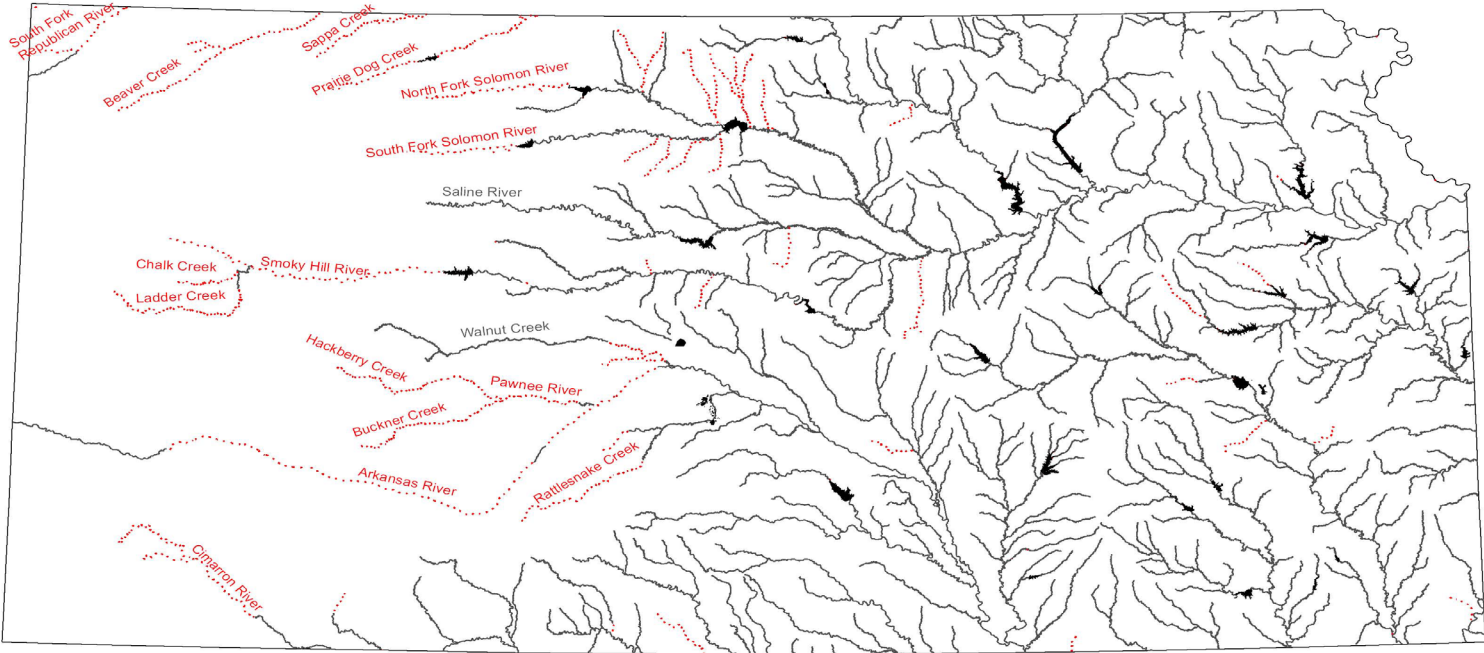
Hugoton, Liberal, ME, Ashland, CA, CM, BA, HP, SU, Elkhart, SV, SW, ME, CA, CM, BA, HP, SU

43 42 41 40 39 38 37 36 35 34 33 32 31 30 29 28 27 26 25 24 23 22 21 20 19 18 17 16 15 14 13 12 11 10 09 08 07 06 05 04 03 02 01 01 02



# Groundwater pumping depletes streamflow statewide

Major Perennial Streams  
1961 and 2009



Kansas Department of Agriculture  
Administrative Services, GIS  
March 12, 2010

Legend

- - - - - Streams regarded as perennial in 1961 but as nonperennial in 2009
- Streams regarded as perennial in both 1961 and 2009



Stream Data provided by the Kansas Department of Health and Environment.  
1961 coverage (USGS; special surveys)  
2009 coverage (KDHE; long-term observations)

Perennial: containing water throughout the year except for infrequent periods of severe drought (USGS, 1996).



Note: Some of the smaller streams shown on this map lacked recent observational data but were carried over as perennial systems pending further study. The standing body of water located near the center of the map and just north of the Arkansas River is Cheyenne Bottoms, which is normally a terminal basin.

# Three Sovereigns.

- The United States is the supreme sovereign.
- Recognized Native American tribes are sovereigns that enjoy autonomy over tribal real property (lands and water rights).
- However, the USA acts as the *trustee* for tribes, especially regarding state affairs.
- The State of Kansas is a sovereign state.
- Therefore, recognizing and adjudicating tribal water rights necessarily involves the participation and cooperation of at least three sovereigns—federal, tribal, and state.



# A Chronology of what follows.

- Time immemorial to 16<sup>th</sup> Century: Tribal homelands
- 16<sup>th</sup>-19<sup>th</sup> Centuries: European conquest, settlement, and genocide
- 1780s-1870s: The “Treaty” era
- 1870s-1900s: The “Reservation” era
- 1887-1934: The General Allotment Act of 1887 and the Allotment Era
- 1908: *Winters v. United States* (1908)
- 1924: Citizenship granted to Native Americans
- 1952: The McCarran Amendment, 43 U.S.C. 666
- 1953: Congress announces its termination policy
- 1963: *Arizona v. California*
- 1981: *Colville Confederated Tribes v. Walton*

# *Winters v. United States*

207 U.S. 564 (1908)

- Three tribes (Gros Ventre, Blackfeet, Assiniboine) inhabit large and separate homelands across the entire watershed of the Milk River in MT.
- 1888: the USA forcibly places the tribes on reservations (Blackfeet, Fort Peck, Fort Belknap) that are a small fraction of the basin, and open the rest of the region to settlement under the homestead laws.
- 1889: Montana enters the Union.
- 1895: White irrigators, upstream of the reservation, secure state law water rights, depriving tribes of water.
- The USA sues to protect the tribes' water supply.

# The *Winters* doctrine, simplified

- **Property:** Tribal water rights are the (reserved) property of the tribe, recognized under federal law. When the USA placed the tribes on reservations, the tribes impliedly reserved water rights.
- **Priority:** the date of the first reservation/treaty.
- **Amount:** the amount necessary to fulfill the purposes of the reservation. If the purpose is agriculture, that will require a lot of water— but *Winters* does not quantify.
- **Federal supremacy:** the USA **can** reserve federal rights to water after statehood.
- Therefore, the tribes' 1888 reserved water rights trump the Anglo settlers' 1895 rights.

# *Arizona v. California*

373 U.S. 546 (1963)

- Arizona sues California to assert rights to the Colorado River under the Colorado River Compact.
- The USA intervenes on behalf of its own lands in the basin and the interests of some (but not all!) tribes in the Colorado River Basin.
- How much water did the tribes reserve? The question *Winters* did not answer. The answer? The “**Practically Irrigable Acreage**” metric.
- The western states evince surprise.
  - *Winters* means what it said!
  - The AZ tribes have 1 MAF of AZ’s 2.8 MAF allocation!
  - And the logic of *Winters* applies to other federal reservations, not just tribal reservations. (e.g., National Forests.)

# *Colville Confederated Tribes v. Walton*

647 F.2d 42 (9<sup>th</sup> Cir. 1981)

- Water in Omak Lake necessary for aboriginal fishing rights secured by treaty with the USA. Does this qualify as a *Winters* right?
- Can individual allottees (tribal members who own lands as individuals under the General Allotment Act of 1877) convey their water rights? If so, how do those rights change when they are conveyed to non-Indians?

## *Colville's* two principal points.

- Tribes are entitled to flow and water levels necessary for recognized fishing and ceremonial purposes; such rights date from “time immemorial.”
- Rules for tribal allottees’ water rights:
  - Size: proportionate to their individual acreage.
  - They enjoy a priority date of the reservation.
  - Immune from abandonment (unlike KWAA rights)
  - Indians may convey their allottee rights to non-Indians, but these rights then become subject to abandonment.

# How much water did Tribes reserve?

- *Winters*: sufficient to “satisfy the purposes of the reservation.”
- *AZ v. CA*: “Practicably Irrigable Acreage,” or PIA.
- *Gila V* (from Arizona) uses 6 factors:
  - Tribe’s historical water use;
  - Use of water for cultural purposes;
  - “Geography, topography, & natural resources” of the tribe, including groundwater availability;
  - Tribe’s economic base & need for water in creating jobs;
  - Past water use as an indicator of future water use;
  - Tribe’s “present & projected future population”
- Kickapoo Tribe of Kansas: municipal build-out standard.



# The Basic Rules, Summarized.

- Tribes entitled to *Winters* rights: implied, reserved, federal rights with a priority date of the reservation/treaty. Typically large and senior water rights.
- Cultural uses of water recognized under *Colville*, especially for fishing and flows.
- Quantities: PIA is the default, with other metrics (such as *Gila V*) as negotiated options.
- Allottees and their successors in interest have individual rights per *Colville*.

# The Challenge of Tribal Water Rights

- Strong, established, and consistently recognized under **federal** law.
- But just because a tribe has a valid claim to *Winters* rights does not, on its own, provide any water supply to tribes. **Turning “paper” rights into “wet water” is the fundamental challenge tribes face, one that is more daunting in an over-appropriated basin.**
- This resembles the civil rights movement of the 1950s and 1960s— realizing rights granted under federal law a century earlier, but blocked by southern states.
- Especially given racism and political pressure to reduce tribal claims. Forces which are **always** present.

# Water Rights Adjudications

(a.k.a. General Stream Adjudications)

- A judicial proceeding involving **every** claimant to water rights in a river basin. Thousands of claimants.
- Typically authorized by state legislation.
- Claimants have the burden of proof to establish the validity and the characteristics of their rights.
- The state is a party.
- The USA is a party, because it has waived its sovereign immunity (McCarran amendment).
- Goal: establish by court decree all the valid claims to the water supply of the basin.
- Some recent examples: Snake River Basin, Idaho; Upper Rio Grande, New Mexico; Gila GSA, Arizona.

# Tribes and Adjudications

- Tribes loom large in a GSA, because of their large and senior reserved rights.
  - Nez Perce, Idaho (Snake River)
  - Hopi and Navajo/Dine, Arizona (Little Colorado River)
- By quantifying the water supply of the basin and all of the valid claims to that supply, adjudications force, and are basically inseparable from, **negotiated settlements.**

# Tribal Water Rights Settlements: the structural dynamics of sovereignty

- Tribes have strong legal claims, but are frequently politically weak and economically disadvantaged.
- Non-Indian, state-law irrigators have inferior and junior rights but are politically strong and financially well-resourced.
- The United States:
  - (a) is a trustee for the tribe(s);
  - (b) provides massive subsidies to agriculture; and
  - (c) can bring money to the negotiations.

# Some common settlement terms

- Tribes accept less water than they are entitled to receive, in exchange for:
  - Funding and financing for tribal water infrastructure;
  - Flexibility in water use, including off-reservation leasing to non-Indian entities; and
  - Moratoria on groundwater pumping near tribal lands.
- State parties accept (some) reductions in their water rights, in exchange for:
  - Certainty of their adjudicated and negotiated rights, without the looming threat of *Winters* claims;
  - The ability to lease tribal water rights.
- The USA funds tribal infrastructure projects through congressional approval of settlements. But that requires Congress to act, and obstacles are many.

# Examples of Settlements

- Montana: state-tribal compacts
- Kansas: the Kickapoo Tribe of Kansas settlement
- Arizona: the Hopi Tribe and the Little Colorado River GSA

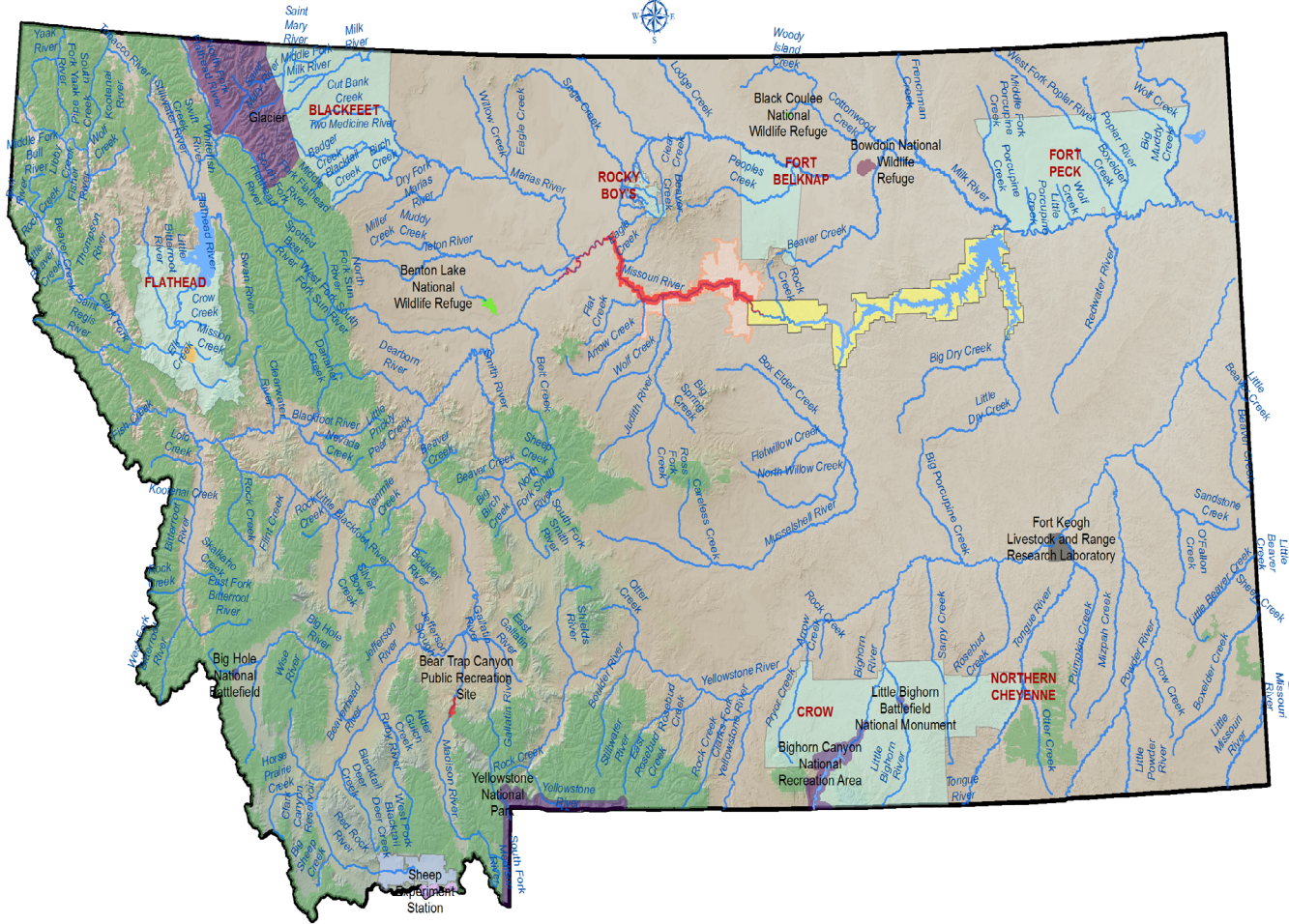


# Montana Tribal Compacts

1979-2015

- Uses the constitutional tool of the interstate compact: a contract between sovereigns (state and tribe) enacted by Congress.
- 7 Compacts established so far:
  - Assiniboine and Sioux Tribes of the Fort Peck Reservation Compact
  - Blackfoot Tribe Compact
  - Chippewa Cree Tribe of the Rocky Boy's Indian Reservation Compact
  - Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation Compact
  - Crow Indian Reservation Compact
  - Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation Compact
  - Northern Cheyenne Tribe Compact
- The effectiveness of several of these compacts remains dependent on as-yet unsecured congressional approval and funding.

# Montana Water Right Compacts



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| <span style="display: inline-block; width: 15px; height: 15px; background-color: #ff4500; border: 1px solid black;"></span> BLM - Wild & Scenic / Bear Trap Canyon | <span style="display: inline-block; width: 15px; height: 15px; background-color: #ffcc00; border: 1px solid black;"></span> USFWS - National Bison Range           |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: #6a3d9a; border: 1px solid black;"></span> National Park Service                  | <span style="display: inline-block; width: 15px; height: 15px; background-color: #ffff00; border: 1px solid black;"></span> USFWS - CMR NWR                        |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: #ffcc99; border: 1px solid black;"></span> BLM - Upper Missouri River Breaks NM   | <span style="display: inline-block; width: 15px; height: 15px; background-color: #ccccff; border: 1px solid black;"></span> USFWS - Red Rock Lakes NWR             |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: #ff99cc; border: 1px solid black;"></span> USDA Sheep Experiment Station          | <span style="display: inline-block; width: 15px; height: 15px; background-color: #993366; border: 1px solid black;"></span> USFWS - Bowdoin NWR                    |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: #666666; border: 1px solid black;"></span> USDA Fort Keogh Livestock Lab          | <span style="display: inline-block; width: 15px; height: 15px; background-color: #00ff00; border: 1px solid black;"></span> USFWS - Black Coulee & Benton Lake NWR |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: #99ffcc; border: 1px solid black;"></span> Montana Indian Reservations            | <span style="display: inline-block; width: 15px; height: 15px; background-color: #669966; border: 1px solid black;"></span> National Forest Land System            |

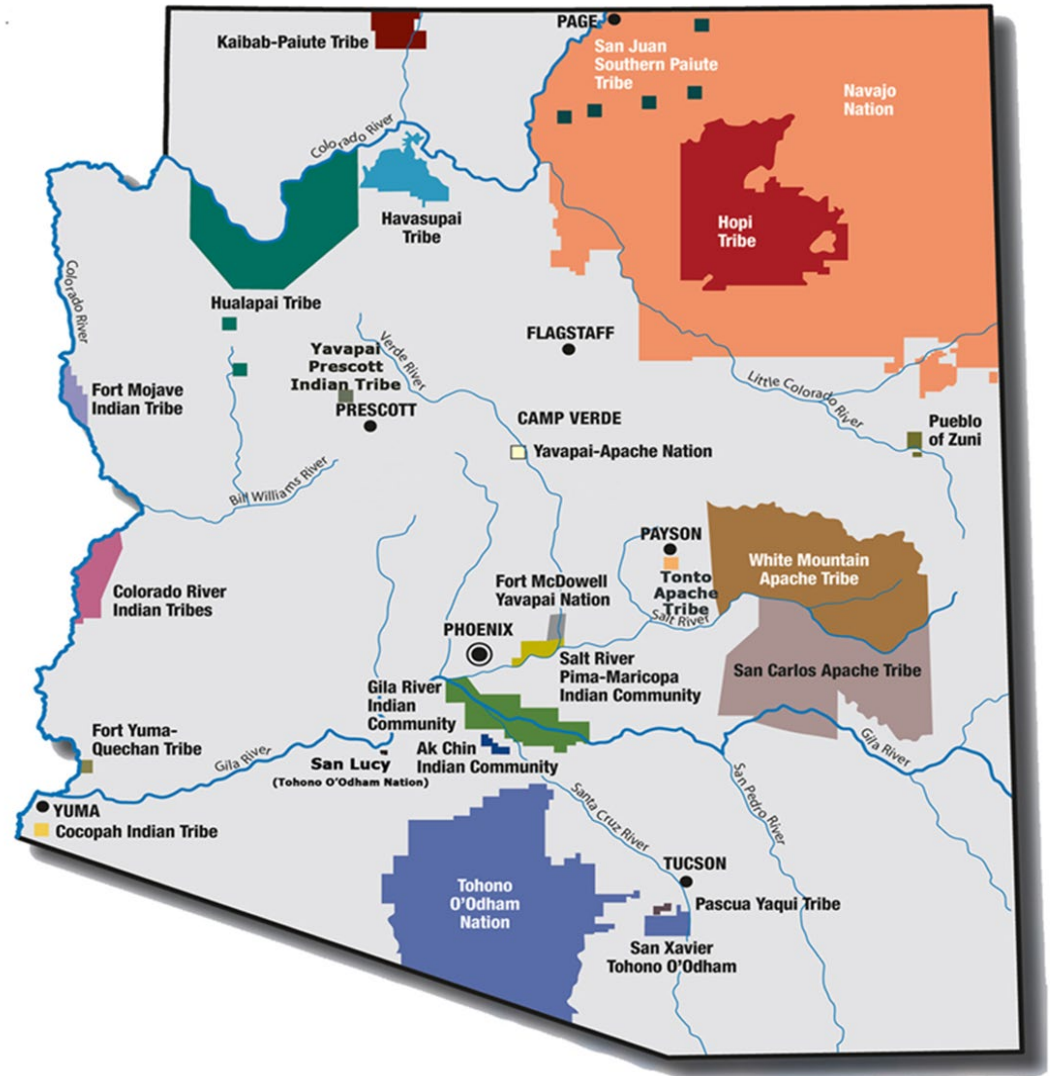


# Kickapoo Settlement, 2016

- Tribe obtains an October 24, 1832 priority (Treaty of Castor Hill), per *Winters*.
- Uses the “municipal build-out” standard to quantify the right: 4,705 AF/Y.
- Domestic use does not count against the tribal water right.
- Tribe can market water off-reservation.
- Tribe may store 18,520 AF in tribal reservoir(s) once completed.
- Tribe must meter all water use and enact a tribal water code within three years of congressional approval.
- State (through DWR) bound to protect the Kickapoo right according to its priority.
- MOA between Tribe and DWR to protect tribal water right during its build-out period.
- Awaiting congressional approval and funding; Tribe continues to work on obtaining land for reservoir.

# Tribal Reservations in Arizona

- Ak Chin (1912)
- Cocopah (1917)
- Colorado River Indian Tribes (1865)
- Fort McDowell Yavapai (1903)
- Fort Mohave (1890)
- Fort Yuma (1884)
- Gila River Indian Community (1859)
- Havasupai (1882)
- Hopi (1882)
- Hualapai (1883)
- Kaibab (1907)
- Navajo/Diné (1868)
- Pascua Yaqui (1978)
- Salt River Pima/Maricopa (1879)
- San Juan Southern Paiute (1907)
- San Carlos Apache (1872)
- Tohono O'odham (1874)
- Tonto Apache (1972)
- White Mountain Apache (1886)
- Yavapai Apache (1865)
- Yavapai Prescott (1935)
- Zuni (1877)



# Hopi Quantification in LCR GSA

- Domestic, Cultural, Municipal, Industrial (DCMI): Estimated future population x GPCD
  - 150 gpcd in Winslow & Cottonwood. Special master said 90 gpcd.
  - Hopi said 9,322 now, 50K in the future. Feds said 8,746 now, 50K in the future. LCRC said 3,069 now/20K in the future. Special master agreed with LCRC
- Economic Development
  - Hopi say 20K af/y for coal liquefaction, 12K af/y for cattle, 6,500 af/y for solar farm
  - Feds say 6,500 af/y for coal plant, and 1,462 af/y for coal mine.
- Irrigation (PIA)
  - Hopi claim 91,282.
  - Feds & LCRC said 18,897
  - Special Master agrees with Feds & LCRC

# Concluding Remarks

- Negotiated settlements are unquestionably superior to litigated results.
- States, tribes, and the USA have accomplished creative and effective solutions.
- Trustworthy data and enforceable laws are critical. Kansas is fortunate in this regard.
- Compare Kansas's hydrological and tribal situations with those of the other western states: we face far fewer and less imposing obstacles to reaching effective settlements.
- Congressional support is usually the most difficult obstacle.

Questions?